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IN THE

Supreme Court of the United States

October Term, 1947

No. 259

ARNOLD BERNSTEIN, also known as ARNOLD M. BERNSTEIN,

Petitioner,

against

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

PETITIONER'S REPLY BRIEF

WILLIAM S. BENNET,
VICTOR HOUSE,
Attorneys for Petitioner.

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Nothing in the answering brief of the respondent herein affects two facts: First, the court below plainly misapplied the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229 (see petition, pp. 2, 5 and 14). Second, the decision of the court below in this case conflicts with decisions in this Court (petition, pp. 7 and 8); in the Second Circuit (p. 8); and also in the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits (petition, pp. 9-13 inclusive).

The statement in the brief of the respondent, at page 1, that "The decision of the Circuit Court of Appeals dismissing the appeal does not present any question whatever of diversity amongst the decisions of the various Circuits or

any unusual or doubtful question of procedure," is astounding. The petition states (p. 7) that 101 cases have been found conflicting with the decision of the court below in this case, some of them in this Court, the majority in the Circuit Courts. The petition quotes (pp. 9-13) from 10 cases in the different Circuits. The Circuit Court of Appeals for the Second Circuit in *United States* v. *243.22 Acres of Land,* 129 F. 2d 678, at page 680, itself refers to the conflict in decisions and describes the word "final" as "slithery". *Baltimore & Ohio Railroad Company* v. *United Fuel Gas Company,* 154 Fed. 2d 545, also refers, at page 547, column one, to the unsatisfactory state of the decisions on this question.

On page 2 of respondent's brief petitioner is described simply as "a stockholder in a German corporation", omitting the fact that he is a citizen of the United States, a resident of the State of New York (R. 20), and therefore a citizen of the same state as the proposed third-party defendant, Chemical Bank & Trust Company, a New York corporation.

The sentence near the bottom of page 2 of respondent's brief, "No attempt was made to make the Bank a co-defendant on the basis of liability to the plaintiff", is misleading. The defendant, as third-party complainant, in its summons requires the Chemical Bank & Trust Company, the proposed third-party defendant, to serve on the attorneys for the plaintiff "an answer to the complaint of the plaintiff, a copy of which is herewith served upon you" (R. 10, 11). The summons follows form 22 attached to the Federal Rules of Civil Procedure, and Rule 14(a) itself requires the third-party defendant to answer the com-

plaint of the plaintiff. The amended complaint of the plaintiff is also Exhibit "A" attached to the notice of motion (R. 12-19). These requirements are not altered by lower court rulings that litigation between the plaintiff and third party defendant cannot occur unless the plaintiff amends his complaint.

At page 3, the respondent's brief says: "The petitioner does not cite any decisions holding or suggesting that an order permitting the impleader of a third party is appealable as a final decision." The petition quotes (pp. 11 and 12) from the opinion in the case of *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co.*, 273 F. 660, 661 (C. C. A. 3d). The first sentence of the quotation is, "This appeal is from an order of interpleader," and the holding of the Third Circuit on this point is "We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal." There is no difference in principle between an impleader and an interpleader. As stated in the petition (p. 15), the order here has precisely the same elements of finality as the order in the *Bank of Taiwan* case.

This Court has held many times that while textbook citations are valuable, and sometimes highly valuable, they are not to be considered as controlling. This applies to the quotation on page 3 of respondent's brief from 1 *Moore's Federal Practice,* page 749. The attention of the Court should be called to the following from 5 *Cyclopedia of Federal Procedure,* 575, sec. 1869: "Though it would seem that orders denying motions to bring in third-party defendants are not appealable because not final, there is authority for appealing

in such cases." Thus, there is on this score a conflict even between text book writers.

On page 4 and 5, the respondent's brief discusses the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229, quoting portions commencing on page 233 thereof and concluding on page 236.* A discussion of the decision in the *Catlin* case was included in petitioner's motion for a rehearing and is therefore before this Court (R. 91-94). We shall not repeat here what we said there. We call the attention of the Court to it here, however, first, because the reference to it in the last three lines on page 1 of the petition is not specific, and second, because we did not call attention, as possibly we should have, to the fact that there are two qualifications in the language of the decision in the *Catlin* case itself. The first is the use of the word "generally" on page 233. This leaves it open to being said that while what

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* The case of *St. Louis I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28, cited in the *Catlin* case at page 233 involved a motion to dismiss an appeal from a decree asserted not to be final. The Court analyzed the complaint, stated what it contained and said that the decree based thereon *was a final decision and therefore appealable, and denied the motion.* If the decision had been that the decree below was not final and therefore the appeal had been dismissed, the situation would have been different. Furthermore, *non constat* but that an order relating to a complaint containing fewer or other statements of fact might also have warranted a decision that it was final and therefore appealable. It is what the *order* does that matters.

The decision of this Court in *United States* v. *River Rouge Co.,* 269 U. S. 411, 414, cited in our petition on page 9, represents a more complete view. The *River Rouge* case was *sub judice* in this Court for the better part of two years and appears to have been thoroughly considered.

is said on that subject may be a correct statement generally, it was not intended as a reversal of the rule in *Forgay* v. *Conrad* (6 How. 201).

The other qualification commences at the precise point in the *Catlin* case where the respondent's brief ends its quotation therefrom, and is as follows:

> "Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner. As will appear, we think such a remedy is available in this case."

The situation here is very different. If the order of the District Court in this case is allowed to stand, the substantive right of the plaintiff to a common law trial by jury, given him by the Seventh Amendment, will be seriously impaired. That right entitles the plaintiff to a jury trial of the issues presented by his pleading and those of the defendant unimpaired by the trial of any separate issue between defendants from which the plaintiff is debarred by the constitutional provision preventing litigation in the United States courts between citizens of the same state where no other Federal ground of jurisdiction appears. If the order of the District Court is permitted to stand, a situation will be created where the defendant, as third-party complainant will litigate (before the same jury as tries the issues between the plaintiff and the defendant) with the Chemical Bank & Trust Company, a citizen of the State of New York. Plaintiff can take no part in this second litigation no matter what

the defendant, as third-party complainant, or the Bank, as third-party defendant, do or say. He cannot even make an objection. This is not a question that "may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner", as the impairment of plaintiff's constitutional right of trial by jury becomes an irreparable injury once it is permitted.

The opinion in the *Catlin* case clearly relates to condemnation proceedings only. Under note 11 at 324 U. S. page 235, it quotes Rule 81(a)(7), limiting the application of the Rules of Civil Procedure in proceedings for condemnation of property under the power of eminent domain. In addition, specific reference to condemnation proceedings is made on nearly every page. On page 232, it is pointed out that certiorari was granted "in order to resolve conflict upon this question among the several Circuit Courts of Appeal." A reading of the opinions in the cases listed in note 6 on page 232 shows that there was a complete conflict of decisions which was resolved in favor of the decision in the Circuit Court of Appeals for the Seventh Circuit (p. 232) and that all of the cases cited in note 6 related to condemnation of real property.

Another amazing statement (pp. 4 and 5 of respondent's brief) is that the decisions in *Ray* v. *Law*, 3 Cranch. 179, *Forgay* v. *Conrad, supra*, and *Thomson* v. *Dean*, 7 Wall. 342, have nothing to do with the case because "they were all decisions where the appeals were decrees deciding the right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving

to be adjusted accounts between the parties pursuant to the decree". The rule first followed by Chief Justice Marshall in *Ray* v. *Law, supra,* and put into words by Chief Justice Taney in *Forgay* v. *Conrad, supra,* is simply that (petition, p. 3):

> "this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

It is in no way limited to "decrees deciding the right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving to be adjusted accounts between the parties pursuant to the decree".

What the rule relates to is not the subject matter of any particular cause of action. "A more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature" is to be applied to the words "final decrees", regardless of the character of the action. This Court also so held in *United States* v. *River Rouge Co.,* 269 U. S. 411, 414, quoted at page 9 of the petition, and also in *Rector* v. *United States,* 20 F. 2d 845, 872, quoted in the petition at page 13.

As to the statement on page 5 of respondent's brief, "It has frequently been held that an order adding parties to an action is not a final order and is not immediately appealable", two things are to be said: First, this is not an or-

dinary order adding parties plaintiff or defendant in an action in which there are complicated issues and conflicting rights. The motion here to bring in the third-party defendant is one brought under that provision of Rule 14(a) of the Federal Civil Rules permitting the defendant to move on notice to the plaintiff "for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to plaintiff for all or part of the plaintiff's claim against him". None of the decisions cited by the respondent have anything to do with motions made under that Rule.

Second, the cases cited do not thoroughly uphold the text. The decision in *Kummer* v. *United States,* 148 F. (2d) 191 (C. C. A. 6, 1945), was affected by the provisions of section 445 of the War Risk Insurance Act as amended. *U. S.* v. *Weekly Publications,* 144 F. (2d) 186 (C. C. A. 2), was an order permitting a *temporary* intervention under a special act, the Informers Act. It did not come under usual rules. In *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282, 290, the opinion begins (p. 231), "Two important questions are presented by these petitions". After these important questions have been disposed of in the opinion, the decision below reversed, and the case remanded, the opinion states, without argument, that other orders were interlocutory and not appealable, had not been considered on their merits and if "ultimately there is an appeal from a final decree the correctness of these orders may be examined" (pp. 290, 291). The decision went no further. The last cited case under this heading, *Central California Canneries* v. *Dunkley Co.,* 282 Fed. 406, 410 (C. C. A. 9), holds that the order there adding a new party plaintiff was not a final order and therefore not appealable. It was a rather complicated patent case.

As to the cases cited at the bottom of page 5 and on page 6 of respondent's brief, with those of them which hold that an order granting a new trial is interlocutory and not appealable, we are inclined to agree. None of them, except *McLish* v. *Roff*, 141 U. S. 661, refers to either *Ray* v. *Law, supra, or Forgay* v. *Conrad, supra,* or *Thomson* v. *Dean, supra.* None of them with the possible exception of *McLish* v. *Roff, supra,* has anything to do with anything involved in this case. That case, decided in 1891, construed a section of the statute creating the Circuit Courts of Appeals. While it cites *Forgay* v. *Conrad* as authority for a portion of the decision we regard the decision as a whole as overruled by the more recent decisions of this Court such as *United States* v. *River Rouge Co., supra,* already referred to. *United States* v. *General Motors Corporation,* 323 U. S. 373 and *Land* v. *Dollar,* 67 S. Ct. 1009, have unquestionably overruled that portion of the decision which held that even the omission of the word "final" from the 1891 statute would not permit the Circuit Courts of Appeals to consider decisions which were not final in the strict sense of the word. That was not the construction put on the word "final" in *Forgay* v. *Conrad, supra,* and followed by the cases referred to in the petition.

CONCLUSION

The petition for a writ of certiorari should be granted as prayed for.

William S. Bennet,
Victor House,
Attorneys for Petitioner.